# CENTER FOR APPELLATE LITIGATION

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## ISSUES TO DEVELOP AT TRIAL

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*This month's edition focuses on the trial attorney's laying the ground work for an argument on appeal that the client's sentence is unduly harsh, and the importance in particular of presenting reasons why your client is deserving of leniency* ***even if your client is being sentenced pursuant to a negotiated plea****. This is because making a record is not just important for the obvious purpose of influencing the sentencing court, but also to support appellate arguments for sentencing reduction. Keep in mind that appellate courts can reduce sentences* ***even if the lower court did not abuse its discretion and even if the sentence was imposed pursuant to negotiated plea, with no risk that the prosecution can then withdraw its consent to the plea****. Excessive-sentence arguments are thus no-risk issues on appeal. And, in fact, the Appellate Divisions* ***do*** *reduce sentences, both relatively short sentences in non-violent cases, and long sentences in serious cases. (This sentence-reduction power is also a reason why it is important to file a notice of appeal, even if the client received a beneficial plea, if the sentence exceeds the minimum.)*

*Another forward-thinking reason to make a comprehensive record at sentencing even in negotiated plea cases is because the Parole Board gets the sentencing minutes. The sentencing minutes may be the only way the Board will learn of mitigating factors or your client's personal circumstances.*

***Bottom line****:*

- In trial cases or open-plea cases, marshal reasons why your client is deserving of leniency. Such arguments are, of course, case-specific and you as defense counsel are in the best position to know what might favorably influence the court, but we'll share our appellate two cents nonetheless. We have found that even in the most difficult case, arguments for leniency can be made in one of two major areas – the nature of the offense or the nature of the offender (hopefully, both). Detail and concrete information are tremendously useful to the appellate lawyer in crafting an excessive sentence argument. Where possible, draw on such things as the client's age, family circumstances, mental health issues, and strengths and vulnerabilities to create empathy for his circumstances and a sense of hope for the future. Remember, your audience is not just for the sentencing court — when emotions may be running high and the presence of the victim or the victim's family might impact decision-making. With the benefit of time and distance, the appellate court might see things differently.

- Institutional providers, public defenders, and 18-B attorneys should have access to funding to retain a sentencing advocacy service (such as the Center for Community Alternatives) or a social worker to conduct a presentence investigation and prepare a

written presentence memorandum in trial or open-plea cases. The comprehensive report these experts prepare will be an invaluable aid at sentencing and will become part of the record on appeal.

- If funding is not available, or a presentence memorandum isn't able to be done, then you will need to get at the information yourself. As you probably know, this will require spending a bit of time interviewing your client with the relevant areas in mind to support a sympathetic narrative. Speak with family members or people who know your client, and encourage them to write letters of support and attend the sentencing. Their letters of support should be as specific as possible - not just that "he's a good person," but providing concrete and specific instances that demonstrate your client's good character and humanity, and/or that illustrate the challenges he's faced.

- Don't simply "rely on the promise" in negotiated plea cases. Even though the sentence is a done deal, you should explain the reasons your client is deserving of leniency and set forth mitigating factors. Remember, the Appellate Division can reduce even an agreed-upon sentence, and the Parole Board will get a copy of the sentencing minutes down the road.

- Waivers of appeal in negotiated plea cases: Don't forego making a record on the assumption that since your client has waived his right to appeal, he won't be able to raise the excessiveness of his sentence on appeal. Although it's true that an *enforceable* waiver will foreclose review of excessive sentence claims, appellate lawyers are practiced (and have enjoyed a fair amount of success) in challenging appeal waivers as invalid and/or failing to satisfy the requirements for a knowing, voluntary and intelligent waiver.

**Relevant caselaw:**

People v. Farrar, 52 N.Y.2d 302 (1981) ("The determination of an appropriate sentence requires the exercise of discretion after due consideration given to, among other things, the crime charged, the particular circumstances of the individual before the court and the purpose of a penal sanction, i.e., societal protection, rehabilitation and deterrence.")

People v. Thompson, 60 N.Y.2d 513 (1983) (1983) (proper remedy when the Appellate Division modifies a negotiated sentence as excessive is reduction by that Court, **not** remittal to the trial court to afford the People an opportunity to withdraw their consent to the plea).

People v. Delgado, 80 N.Y.2d 780 (1992) ("An intermediate appellate court has broad, plenary power to modify a sentence that is unduly harsh or severe under the circumstances, even though the sentence may be within the permissible statutory range.")

People v. Smith, 32 A.D.3d 553 (3rd Dep't 2006)("no-merits" Anders brief rejected where based on appellate counsel's subjective belief that defendant was unlikely to prevail on his only claim, that his negotiated but discretionary sentence was too severe, and defendant had not waived his right to appeal).

**General Reminders:**

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.

- If you are litigating a 30.30 issue, state in your initial motion that you are entitled to a pre-trial hearing under People v. Allard and CPL § 210.45(5)(c). Do a reply even if you don't think the prosecution has rebutted your showing with conclusive proof.

- If you've unsuccessfully challenged any prospective juror for cause, then, barring a strategic reason for not doing so, **exhaust your peremptories**, or the denied cause challenge will not be preserved for appeal;

- Also on the subject of jury selection, if you are litigating a *Batson* challenge against the prosecution, remember the "third step" — challenge the prosecution's race or gender neutral reasons as pretextual by showing (1) that similarly situated jurors of a different race or gender were not challenged. Use the information you've culled about prospective jurors from that round or prior rounds; or (2) that the challenged juror would be expected to favor law enforcement (e.g. was a crime victim, has law enforcement ties, gave prosecution-friendly answers).

See past issues at http://appellate-litigation.org/issues-to-develop-at-trial/

Send us ideas for future issues at info@cfal.org